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ORIGINAL

Supreme Court, U.S.
FILED
AUG 20 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-48

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA

Petitioner,

vs.

HUGHES ANDERSON BAGLEY

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Davis v. Alaska, 415 U.S. 308 1978 requires, without a showing of prejudice, automatic reversal of a conviction due to the failure of the government to disclose impeachment material.

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REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction to hear this case.

The Ninth Circuit Court of Appeals granted a Stay of Mandate on April 12, 1984, which reads as follows:

> On Motion of Respondent-Appellee United States, good cause having been shown to recall the mandate issued herein on March 12, 1984, and to stay reissuance of such mandant to permit the United States to petition for a Writ of Certiorari from the Supreme Court, it is hereby
> ORDERED that the mandate herein is recalled and reissuance thereof shall be stayed until April 24, 1984, such stay to continue thereafter pursuant to Rule 41(b) of the Fed. R. App. Proc. if a Petition for Writ of Certiorary has been lodged with the Supreme Court.

Fed. R. App. Proc. 41(b) states, in relevant part, that:

> If during the time period of the stay there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the Writ in that Court, the stay shall continue until final disposition by the Supreme Court.

The Stay of Mandate expired on April 24, 1984, since a notice from the Clerk of the Supreme Court, indicating that a Petition for a Writ of Certiorari had not been filed with the Clerk of the Court for the Ninth Circuit Court of Appeals. The Mandate has reissued, and this Court lacks jurisdiction to hear this matter.

II. The Opinion by the Ninth Circuit Court of Appeals is Correct and Does Not Warrant Review by this Court.

The opinion by the Ninth Circuit Court of Appeals is, we believe, correct. The opinion was based upon this Court's decision

in Davis v. Alaska, 415 U.S. 308 (1978). This Court recently quoted from Davis in United States v. Cronic, __ U.S. __, No. 82-660 (May 14, 1984), 35 Cr.L.Rep. 3061 (May 16, 1984), stating that "No specific showing of prejudice was required in Davis . . . because the petitioner had been 'denied the right of effective cross-examination' which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" 35 Cr.L.Rep. at 3064. By denying the right to effective cross-examination, "The right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing," 35 Cr.L.Rep. at 3063, is lost. The "Process loses its character as a confrontation between adversaries, [and] the constitutional guarantee is lost." Id.

CONCLUSION

We submit that the harmless error rule proposed by the government does not and should not apply to cases involving the denial of effective cross-examination. This position is, we believe, supported by this Court's decisions in Davis and Cronic. The rule proposed by the government would allow the prosecution to withhold relevant, discoverable evidence from the trier of fact and would render the adversarial process impotent. For these reasons the petition for a Writ of Certiorari should be denied.

Dated this 17th day of August, 1984

Respectfully submitted,

for: Michael G. Martin
Attorney for Respondent

CERTIFICATE OF MAILING

I certify that on August 17, 1984, I mailed a copy of the Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530.

for Michael G. Martin

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

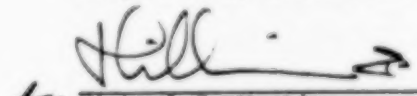
Respondent, Hughes Anderson Bagley, pursuant to Rule 46 and 18 U.S.C. § 3006A(d)(6), asks leave to file the attached Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs, and to proceed in forma pauperis. Respondent was represented by the Federal Public Defender in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

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WHEREFORE, Respondent, by and through his undersigned counsel, respectfully prays that this Court grant leave to proceed in the Supreme Court of the United States in forma pauperis.

DATED this 17th day of August, 1984.

Respectfully submitted,



By: Michael G. Martin
Attorney for Respondent